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NO. 83-128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

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ROBERT RAMIREZ

QUESTIONS PRESENTED

3 1. Whether, under any circumstances, a federal
4 prisoner, suspected of committing a crime while in prison
5 and placed in administrative detention, is constitutionally
6 entitled to an attorney prior to indictment?

8 2. Whether dismissal of the indictment is the
9 appropriate remedy where an indigent federal prisoner is
10 held in solitary confinement for 19 months as a suspect
11 in a murder investigation and his requests for appointed
12 counsel are denied until he is formally indicted 20 months
13 after the alleged crime?

PARTIES TO THE PROCEEDING

17 In addition to the parties shown by the caption of
18 this case, Robert Ramirez, Philip Segura, Adolpho Reynoso,
19 Robert Eugene Mills, and Richard Raymond Pierce were appellants
20 below and are respondents here.

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Constitution:

20 United States Constitution. Amendment VI 4.8

3 IN THE SUPREME COURT OF THE UNITED STATES
4

5 October Term, 1983
6

7 UNITED STATES OF AMERICA, Petitioner,
8

9 vs.
10

11 WILLIAM GOUVEIA, et al., Respondents.
12

13 ON PETITION FOR A WRIT OF CERTIORARI
14 TO THE UNITED STATES COURT OF APPEALS
15 FOR THE NINTH CIRCUIT
16

17 BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION
18

19 OPINION BELOW
20

21 The opinion of the Court of Appeals is reported at
22 704 F. 2d 1116 (9th Cir. 1983).
23

24 JURISDICTION
25

26 The judgment of the Court of Appeals was entered on
27 April 26, 1983. The petition for writ of certiorari was filed
28 by the Government on July 25, 1983, after being granted a
29 thirty-day extension of time. The jurisdiction of the Court
30 is invoked under 28 U.S.C. 1254(1).
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STATEMENT

2 Thomas Trejo was an inmate at the Federal Correctional
3 Institute at Lompoc, California. On November 11, 1978, Mr.
4 Trejo, who was also known as "Hopo", was stabbed to death in
5 Cell A-18 of M Unit at the prison. He had received 43 stab
6 wounds in the heart. The autopsy surgeon estimated the time
7 of death to be between noon and 1:00 p.m.

8 On the evening of November 11, 1978, three of the
9 Respondents in this case, Adolpho Reynoso, Pedro Flores and
10 William Gouveia, were placed in solitary confinement in the
11 Administrative Detention Unit (ADU). On November 22, 1978,
12 these three Respondents were returned to the general population.
13 According to the declaration of James R. Wilkins, the FBI had
14 made a determination as of December 4, 1978, concerning who
15 was responsible for the death of Thomas Trejo. On December 4,
16 1978, the prison officials placed Adolpho Reynoso, Pedro
17 Flores, William Gouveia, Robert Ramirez, Phillip Segura and
18 Steven Kinard into solitary confinement. These six
19 individuals were the suspects in the Thomas Trejo murder.

20 However, these six individuals, including the Respondent
21 Robert Ramirez, were not indicted for the murder of Thomas
22 Trejo until June 17, 1980. And the first time that the
23 defendants were brought into court for an arraignment was on
24 July 14, 1980. Thus, Respondent Robert Ramirez remained in
25 solitary confinement as a suspect in the murder of Thomas Trejo
26 for twenty months before being brought to court to face
27 criminal charges alleging that he was the murderer of
28 Thomas Trejo.

1 that an attorney be provided for him. This request appears
2 in the FBI report concerning the interrogation prepared by
3 James R. Wilkins. An attorney was not formally appointed to
4 represent Mr. Ramirez on the murder charge until July 14,
5 1980, when Mr. Ramirez appeared to enter a plea of not guilty
6 to the indictment.

7 By the time that Respondent appeared in court on
8 July 14, 1980, over 21 months had passed since the date of
9 the death of Thomas Trejo. Because of the delay on the part
10 of the government, almost two years had elapsed before the
11 Respondent was brought to trial. Because of this long delay
12 in bringing a formal charge against the Respondent and providing
13 him with counsel, the attorney that was ultimately appointed
14 to represent Respondent was forced to conduct an investigation
15 into the case almost two years after the death had occurred.

16 With the passage of so much time between the date of
17 the death and the appointment of counsel for Respondent,
18 several difficulties arose. Witnesses were difficult to locate
19 and memories of the events of November 11, 1978 had begun to
20 fade. Several names listed in the Respondent's "notice of
21 alibi" did not appear and testify at trial because they could
22 not be located. In essence, while the Government was able
23 to begin their investigation on the very day of the murder and
24 continue that investigation for two years, the Respondent, on
25 the other hand, was deprived of the opportunity to conduct a
26 fresh investigation while the memories of witnesses were still
27 clear, and while those witnesses could still be found.

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ARGUMENT

3 In this case, the Court of Appeals for the Ninth
4 Circuit held that lengthy preindictment isolation without
5 the assistance of counsel irrevocably prejudiced the ability
6 of the Respondents to prepare an effective defense, and thus
7 unconstitutionally deprived them of their Sixth Amendment
8 right to counsel and to a fair trial. United States v. Gouveia,
9 704 F. 2d 1116, 1119 (9th Cir. 1983). Since the Government's
10 conduct in this case resulted in harm which was not capable
11 of after-the-fact remedy, the Ninth Circuit ruled that the
12 Respondents were in a position similar to suspects who were denied
13 a speedy trial, and thus dismissal of the indictment was the
14 only certain remedy. United States v. Gouveia, supra, at
15 1125-1127.

A. THE RIGHT TO COUNSEL.

17 The Government argues that the opinion of the Ninth
18 Circuit is in conflict with Kirby v. Illinois, 406 U.S. 682
19 (1972). This Court stated in Kirby that the Sixth Amendment
20 right to counsel "attaches only at or after the time that
21 adversary judicial proceedings have been initiated" against
22 an accused. Kirby v. Illinois, supra, at 688. Thus, in Kirby,
23 this Court held that the right to counsel does not attach to
24 out-of-court eyewitness identification procedures conducted
25 prior to indictment. See also, United States v. Ash, 413 U.S.
26 300 (1973) (no right to counsel at photographic showups).

27 However, the facts in the case now before this Court
28 are far different from the situations that existed in Kirby and
29 Ash. In Kirby, for example, the defendant was claiming that
30 he was entitled to the presence of counsel at a pre-indictment
31 lineup, which occurred on the same day that the defendant was
32 arrested. The Court was reluctant to extend such a right

1 to counsel, which it noted, did exist during a post-indictment
2 lineup. See, United States v. Wade, 388 U.S. 218 (1968).

3 The Respondent's right to counsel issue does not
4 arise in the context of a pre-indictment lineup. Indeed,
5 eyewitness identification has nothing to do with this case.
6 The Respondent Ramirez and his three co-defendants were
7 deprived of their right to counsel for twenty months while
8 they were placed in solitary confinement as suspects in a
9 prison murder.

10 This occurred while the Government conducted its
11 investigation into the case with the help of the Federal Bureau
12 of Investigation. Since Respondent was serving a federal
13 prison sentence for bank robbery, within a month after the
14 murder, the prison held a prison disciplinary hearing at which
15 the Respondent was found guilty of the murder. His punishment
16 was loss of good time sentence credits and placement in
17 solitary confinement. At the hearing, however, the Respondent
18 asked for the assistance of an attorney. Since the Respondent
19 was indigent, he was unable to privately retain an attorney.
20 No attorney was provided for the Respondent until he was
21 indicted twenty months later.

22 Although the Kirby decision does appear to limit the
23 right to counsel to the post-indictment stage, a different rule
24 must be applied to cases involving prison crimes, such as
25 occurred in this case. In Escobedo v. Illinois, 378 U.S. 478
26 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), this Court
27 extended the right to counsel to the post-arrest interrogation
28 of an accused by the police, even though such interrogation
29 occurred prior to indictment. Later, in United States v. Wade,
30 388 U.S. 218, 227 (1967), this Court, in extending the right
31 to counsel to the defendant's participation in a lineup, stated
32 that a defendant enjoys a right to counsel at every critical

1 stage in the prosecution.

2 Clearly a critical stage in the prosecution occurred when
3 the Respondent was placed in solitary confinement, deprived of
4 counsel, and excluded from participation in the investigation
5 into the prison homicide in which he was a suspect. Respondent's
6 placement in solitary confinement was clearly the first step
7 in the prosecution by the Government of its case against the
8 Respondent and his co-defendants. The Government's argument
9 that the administrative detention of a prisoner, who is a
10 suspect in a prison crime, is not accusatory, is an argument
11 that ignores the reality of what occurred in this case. The
12 placement of the Respondent in solitary confinement was not
13 merely a security measure. If it was only a security measure,
14 there would have been no criminal prosecution. Here, there was
15 such a prosecution.

16 It is true that a person is not an "accused" within
17 the meaning of the Sixth Amendment right to a speedy trial
18 until he is indicted. United States v. MacDonald, 456 U.S. 1,
19 6 (1982); United States v. Marion, 404 U.S. 703 (1971).
20 However, MacDonald and Marion are not right-to-counsel cases.
21 They are speedy trial cases, which focus upon the time within
22 which criminal charges are brought to trial. The right to
23 counsel provision of the Constitution is concerned more with
24 the underlying fairness of the proceedings, and thus precise
25 questions of time are not as critical to the determination of
26 when the right to counsel is to apply.

27 The Government has argued that the Ninth Circuit's
28 opinion in this case will interfere with the security measures
29 taken by the prison authorities in connection with prison
30 crimes. It is argued that there should be no right to counsel
31 recognized in this situation because this is merely the
32 investigation stage of the proceeding and the prison has no

1 statutory authority to appoint counsel for prisoners suspected
2 of criminal acts.

3 However, in Miranda and Escobedo, this Court afforded
4 a right to counsel to suspects during custodial interrogation.
5 This was done despite the fact that custodial interrogation is
6 part of the investigatory stage of the prosecution and the fact
7 that the police have no power to appoint counsel for the suspect
8 under interrogation. It was also argued in Miranda and
9 Escobedo that recognition of the right to counsel at the
10 interrogation stage would interfere with police conduct of
11 criminal investigations. However, none of these arguments
12 were accepted by this Court in Miranda or Escobedo.

13 The case of Miranda v. Arizona, 384 U.S. 436 (1966)
14 did not result in the placement of lawyers at police stations
15 for the purpose of being appointed to represent suspects
16 during custodial interrogation. It resulted in the termination
17 of all police interrogation when the suspect, after being
18 informed of his right to counsel, requested counsel to be
19 present at the interrogation.

20 In the same manner, the Ninth Circuit's opinion in
21 the Gouveia case will not result in the placement of lawyers
22 in the prisons to assist the prisoners in the investigation
23 of their cases. It will, however, result in avoiding in the
24 future those situations in which a prisoner is placed in
25 solitary confinement for twenty months prior to indictment
26 without the assistance of counsel during that time.

27 Although the Ninth Circuit's opinion in this case
28 focuses upon the right to counsel, it also rests in part upon
29 the fact that the Government unnecessarily delayed bringing the
30 indictment in this case. During that period of delay, the
31 Government slowly investigated and prepared its case, while the
32 Respondent was kept in isolation away from the assistance of

1 counsel. After the passage of twenty months, when counsel was
2 finally appointed to represent the Respondent, the case had
3 become so old that Respondent's constitutional right to counsel
4 was infringed upon. Thus, the Ninth Circuit's opinion is
5 designed to prevent, in the future, long delays in the
6 initiation of criminal charges in cases involving prison
7 crimes. The ultimate effect, of course, is to protect the
8 accused's right to counsel, recognizing the fact that
9 counsel's effectiveness can best be assured by his early
10 entry into the case on behalf of the accused.
11

12 B. THE REMEDY OF DISMISSAL.

13 The Government has also argued that dismissal of the
14 indictment was not the appropriate remedy in this case, even
15 assuming a violation of the right to counsel has occurred.
16 The Government relies upon this Court's recent opinion in
17 United States v. Morrison, 449 U.S. 361 (1981).

18 In Morrison, this Court held that dismissal of an
19 indictment because of a violation of the Sixth Amendment right
20 to counsel is not an appropriate remedy unless there is some
21 showing of an adverse consequence to the representation of
22 the accused or to the fairness of the proceeding leading to
23 conviction. In Morrison, this Court found that no prejudice
24 occurred when the accused was visited by Government agents
25 in the absence of her counsel. Thus, dismissal of the indictment
26

27 1/The Solicitor General has suggested that there is no
28 violation of an inmate's right to counsel because the prison
29 provides a "staff representative" to assist accused prisoners
30 at administrative detention hearings. Such a suggestion is
31 patently absurd. First, the staff member is not a lawyer.
32 Secondly, the staff member is in reality a prison guard.
There is no attorney-client privilege affording the prisoner
confidentiality in his dealings with the staff member. And
finally, the staff member is more likely to be viewed by
the prisoner as a spy for the government.

1 was not appropriate under the facts of the Morrison case.

2 However, this Court's opinion in Morrison did not
3 reject the remedy of dismissal in the appropriate case. This
4 Court stated that "Our approach has thus been to identify and
5 then neutralize the taint by tailoring relief appropriate in
6 the circumstances to assure the defendant the effective
7 assistance of counsel and a fair trial." United States v.
8 Morrison, 449 U.S. 361, 365 (1981). In some cases, the
9 appropriate remedy is to reverse the conviction and order a
10 new trial at which evidence obtained in violation of the right
11 to counsel is suppressed. See, Massiah v. United States,
12 377 U.S. 201 (1964); United States v. Wade, 388 U.S. 218
13 (1967). But where there is a continuing prejudice which
14 cannot be remedied by a new trial or suppression of evidence,
15 this Court has recognized that dismissal of the indictment is
16 the appropriate remedy. United States v. Morrison, supra,
17 at 366 n.2, citing United States v. Marion, 404 U.S. 307,
18 325-326 (1971).

19 The instant case is one where there is a continuing
20 prejudice that cannot be remedied by mere reversal of the
21 conviction or suppression of evidence. Each of the Respondents
22 were unable to locate defense witnesses because the witnesses,
23 many known only by nicknames, were transferred to other
24 institutions, released from custody, or died before the
25 Respondents were indicted and afforded counsel. The
26 Government's delay in indicting the Respondents infringed upon
27 their right to counsel because of counsel's inability to
28 locate and present these defense witnesses. Because the
29 blame is properly placed upon the Government for this
30 infringement of the right to counsel and because it affects
31 the fairness of the proceeding which led to the convictions,
32 dismissal of the indictment is the appropriate remedy in this

1 case. The result reached by the Ninth Circuit is thus a
2 natural extension of this Court's decision in United States
3 v. Morrison, 449 U.S. 361 (1981).

4

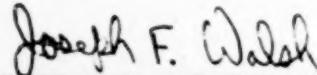
5 CONCLUSION

6 Based upon the foregoing, the Respondent Robert
7 Ramirez urges that the Government's petition be denied.

8

9 Respectfully submitted,

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JOSEPH F. WALSH
14 Attorney for Respondent
ROBERT RAMIREZ

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PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at 316 West Second Street, Suite 1200, Los Angeles, California 90012, by Joseph F. Walsh, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On August 31, 1983, I served the within
BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

on the interested parties in said action by depositing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States, at Los Angeles, California, addressed as follows:

Rex E. Lee, Solicitor General
Department of Justice
Washington, D.C. 20530
Attention: John F. De Pue, Attorney

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453 South Spring Street, Suite 1017
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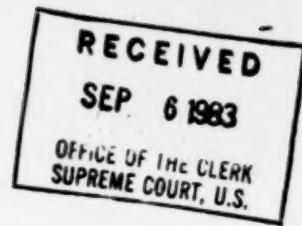
24 I declare under penalty of perjury that the foregoing
25 is true and correct.

Dated August 31, 1983, at Los Angeles, California.

Brooke Moyer

MOTION FILED
SEP 6 1983

ORIGINAL



NO. 83-128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS
AND FOR THE APPOINTMENT OF COUNSEL;
DECLARATION OF JOSEPH F. WALSH

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9 ROBERT RAMIREZ

10
11 IN THE
12 SUPREME COURT OF THE UNITED STATES

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17 UNITED STATES OF AMERICA,) NO. 83-128
18 Petitioner,) MOTION TO PROCEED IN FORMA
19 vs.) PAUPERIS AND FOR THE
20 WILLIAM GOUVEIA, et al.,) APPOINTMENT OF COUNSEL;
21 Respondents.) DECLARATION OF JOSEPH
22) F. WALSH
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20 Pursuant to Rule 46 of the Rules of this Court,
21 Respondent ROBERT RAMIREZ asks leave to file an opposition to
22 a petition for writ of certiorari to the United States Court
23 of Appeals for the Ninth Circuit without prepayment of costs
24 and to proceed in forma pauperis.

25 Respondent further requests that Joseph F. Walsh,
26 Attorney at Law, be appointed as counsel for Respondent in
27 this Court. An affidavit in support of this motion is attached.

28 DATED: August 31, 1983.

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DECLARATION OF JOSEPH F. WALSH

JOSEPH F. WALSH declares the following to be true and correct under penalty of perjury:

1. That I am an attorney licensed to practice in the State of California and am admitted to the Bar of the United States Supreme Court;

2. That I was appointed to represent Respondent Robert Ramirez by the United States Court of Appeals for the Ninth Circuit, and to act as his attorney on the appeals of his criminal convictions; I was also appointed by the United States District Court to represent Respondent in two jury trials which ultimately led to his convictions and sentence in this case;

3. That Respondent Robert Ramirez, because of his poverty, is unable to pay the costs or attorney fees for representation before this Court and is unable to give security for same;

4. This review is sought in good faith; the petition raises the issues of whether the Respondent was denied his constitutional right to counsel by his placement in solitary confinement in a federal prison prior to indictment and whether dismissal of the indictment is the appropriate remedy.

5. If the petition for writ of certiorari is granted, it is respectfully requested that the Court appoint Joseph F. Walsh, Attorney at Law, 316 West Second Street, Suite 1200, Los Angeles, California, (213) 627-1793.

Executed on August 31, 1983, at Los Angeles, California.

Joseph F. Walsh
JOSEPH F. WALSH

PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at 316 West Second Street, Suite 1200, Los Angeles, California 90012, by Joseph F. Walsh, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On August 31, 1983, I served the within
MOTION TO PROCEED IN FORMA PAUPERIS AND FOR THE APPOINT-
MENT OF COUNSEL; DECLARATION OF JOSEPH F. WALSH
on the interested parties in said action by depositing a
true copy thereof enclosed in a sealed envelope with postage
thereon fully prepaid in a mailbox regularly maintained by
the Government of the United States, at Los Angeles,
California, addressed as follows:

Rex E. Lee, Solicitor General
Department of Justice
Washington, D.C. 20530
Attention: John F. De Pue, Attorney

Manuel Araujo, Attorney at Law
453 South Spring Street, Suite 1017
Los Angeles, California 90013

Joel Levine, Esq.
Stilz, Boyd, Levine & Handzlik
Two Century Plaza, Suite 1200
2049 Century Park East
Los Angeles, California 90067

Charles Diamond, Esq.
O'Melveny & Meyers
611 W. Sixth Street
Los Angeles, California 90017

Edwin S. Saul, Attorney at Law
15760 Ventura Boulevard
Encino, California 91436

Michael J. Treman, Attorney at Law
105 E. De La Guerra, Suite 5
Santa Barbara, California 93101

24 I declare under penalty of perjury that the foregoing
25 is true and correct.

Dated August 31, 1983, at Los Angeles, California.

Brooke Moye